EXTRATERRITORIALITY

[Control mechanisms for preventing Rights violations by transnational companies]

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WHY ARE REFLECTIONS ON EXTRATERRITORIALITY IMPORTANT FOR ENSURING RESPECT FOR HUMAN RIGHTS?

Despite the recognition of the universality of Human Rights, and the participation of a large majority of countries in the International Human Rights System, States tend to limit their responsibility to within their own borders, which means there is a void in effective protection for Human Rights at an international level, which can also be extrapolated to the protection of Economic, Social and Cultural Rights (ESCR). For their part, transnational corporations, as key actors in the process of globalisation, are increasingly being singled out for their role in systematic Human Rights violations[1]. There are thousands of global Investment Protection Treaties that establish binding judicial frameworks in the interests of the companies, yet there are no instruments that oblige companies to respect ESCR and the environment. At the same time, States, through their foreign policies, actively promote the internationalisation of their companies. This promotion is not accompanied by sufficient control mechanisms to ensure compliance with ESCR and prevent their violation (Ortega 2007). For example, this aspect was looked at by Ortega (2007) in the case of the Spanish State.

This document introduces some of the tools and legal frameworks that exist at an international and European level, and examines the specific cases of the Spanish State and Catalonia, with a view to finding ways to increase public control over private actors at an extraterritorial level.

THE EXTRATERRITORIAL OBLIGATIONS OF STATES

At an international level: The Maastricht Principles

In 2011, following a decade of research, the Extraterritorial Obligations (ETO) Consortium, a group of experts in international law and human rights[2], agreed

1 See the website of the Global campaign to Stop Corporate Impunity.

to the **Maastricht Principles** (MP) on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (ESCR)[3]. The areas detected by the Consortium as causing the most concern, in terms of protecting ESCR were: the control and regulation of the behaviour of transnational companies; the role of International Financial Institutions (IFIs); and treaties, investment protection schemes, and trade agreements. **The international system of Human Rights** includes the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the International Covenant on Civil and Political Rights, among others, including many regional instruments. The Maastrict Principles are based on this system, and seek to clarify the content of State's extraterritorial obligations to make economic, social and cultural rights a reality. According to the Principles, every State has the obligation to achieve ESCR for all persons within their territory, but they also **have extraterritorial obligations** to respect, protect and comply with these rights[4].

These extraterritorial obligations include:

- The actions or omissions of a State, taking place inside or outside its territory, that ***affect the enjoyment of Human Rights outside its territory.***
- Obligations of a global nature, established by the UN Charter, that require the adoption of separate or coordinated measures involving international cooperation, to ensure universal Human Rights.

Protest over the massacre of workers in Marikana (South Africa), in the mines owned by the British company Lonmin (Source: Stop Corporate Impunity Campaign).

It is worth highlighting that when referring to the scope or jurisdiction of these extraterritorial obligations, the MP considers that it covers any situation in which the State, acting separately or as part of a joint venture, through its executive, legislative or judicial powers, can exercise a decisive influence or adopt measures that work towards achieving ESCR **outside of their territory**, in accordance with International Law.

In terms of the **relationship between the State and private actors**, the MP point to the "**obligation to protect**", which includes the obligation of States to regulate (adopt all necessary measures, including diplomacy), **to ensure that these private actors do**

2 It is worth noting that the research team included ex-Special Rapporteurs to the UN Human Rights Council.

3 Among the predecessors to the Maastricht Principle we find the Limburg Principles for the Application of the International Covenant on Economic, Social and Cultural Rights (1986) and the Maastricht Directives on Violations of ESCR (1997). See **this link.**

4 See also the **Vienna+20 Declaration**

not destroy or undermine the enjoyment of ESCR. This obligation is particularly applied in the following cases:

- When the **non-State actor has the nationality of the State in question**
- When the activities of **the company, the parent company or the controlling interest**, are registered or based, have their principal business headquarters or develop substantial commercial activities in the State in question[5].
- **When the conduct that violates ESCR constitutes a violation of an imperative rule of International Law**. Here States should exercise universal jurisdiction over those responsible or legally pass them over to the appropriate jurisdiction.

The MP also indicate that States that are able to influence the conduct of non-State actors (for example through the system of public contracts or international diplomacy), should do so in accordance with the International System of Human Rights. Likewise, States have the obligation to cooperate in ensuring that non-State actors do not undermine the enjoyment of ESCR, and that includes the application of guarantees and measures of prevention and accountability. The MP include the obligation to use and cooperate with mechanisms for official complaints between States, including Human Rights instruments, in order to **guarantee reparations** for any violation of an extraterritorial obligation relating to ESCR. States can therefore request reparations for affected individuals, as beneficiaries of the treaties on ESCR. It is also observed that States have the obligation to cooperate with international and regional Human Rights mechanisms, including periodic examinations of the reports and investigations carried out by the UN Human Rights Council, and other monitoring mechanisms on the issue of implementing extraterritorial obligations for the respect of ESCR1[6].

External Responsibilities and Human Rights in the European Union

Initiatives linked to voluntary (non-binding) regulations, particularly Corporate Social Responsibility (CSR), have multiplied in Europe. Of these it is worth highlighting those contained in the Green Paper (2001), the Communiqué on CSR of July 2002 which refers to the corporate contribution to sustainable development, and the Communiqué of March 2006 on "Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility". Nevertheless, even the European Parliament has observed that these initiatives are insufficient. Thus, for example, the Resolution of 13th March 2007 considers that in the EU debate on CSR "emphasis should be shifted from 'processes' to 'outcomes', leading to a measurable and transparent contribution from business in combating social exclusion and environmental degradation in Europe and around the world". At the same time, Parliament asked the Commission to guarantee that transnationals "with headquarters in the EU and units of production in third countries (...) comply

5 According to Pigrau (2015), the criteria most often used to determine where a company is based, as stipulated by the International Legal Association (ILA) in the "Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations" (Sofia, 2012), are:
- The place where it has its headquarters or where the legislation under which the company was formed is in force.
- The location of its central administration
- The place were its principal trading activity takes place.

6 Currently, the work of the Consortium on extraterritorial obligations consists of an exploration of the application of the Maastricht Principles in spheres such as: financial regulation, corruption, trade, investment, intellectual property, the extraction industries, land grabbing, transnational corporations, climate change, the Right to Food, IFIs, and others.

with the fundamental rules of the International Labor Organisation, and the social and environmental conventions" (Pigrau 2015).

Nevertheless, if we explore more binding instruments, particularly external actions in the context of the EU, we must remember that under the terms of the Treaty of Lisbon, States do not give up their sovereignty on matters of foreign policy. In this sense, the power of the Union is very relative, as even the European Union's Courts of Justice do not have jurisdiction over foreign policy. Nevertheless, some instruments do exist that could be useful, in terms of the foreign responsibility of any actor linked to the Union, for example, **Article 21 of the Treaty of Lisbon**. This Article stipulates that the foreign activities of the Union should be guided by principles such as: democracy, respect for the law, the universality and inalienability of Human Rights, fundamental freedom, respect for human dignity, equality, solidarity and respect for the Principles of the United Nations Charter and International Law. It also states that the Union should respect these principles in the development and implementation of the different areas of it's foreign activities, and in all external aspects of its policies. Furthermore, the Union should ensure coherence between the different spheres of its external activities, and between these and the rest of its policies. The Council and the Commission, with the support of the High Representative of the Union for Foreign Affairs and Security Policy, are responsible for defending that coherence.

When the Treaty of Lisbon came into effect, the regulations on Export Credit Agencies (ECAs), a key actor with a public mandate to support the internationalisation of business, referred directly to Article 21 and it was demanded of all member States (and their respective ECAs), that they comply with the general regulations of the European Union in their activities abroad (Ecawatch 2013). As a result of this, the International Network **Ecawatch** requested that the Böhler chambers conduct a study into possibilities for the application of Article 21. Let us briefly consider their results, because they are relevant to these reflections. Samkalden (2013) reminds us that EU foreign policy is integrated in the Common Foreign and Security Policy (CFSP). Nevertheless, the principles stipulated in Article 21 are not only applicable here. There is another article of the Treaty of Lisbon, Article 205, that refers to Article 21 and establishes its sphere of application as all EU activities and actions at an international level, integrating it with another section of EC legislation, that of the Treaty on the Functioning of the European Union (TFEU). This means that Article 21 is applicable to all European actions abroad. The major difference in terms of its application within the frameworks of the CFSP and/or the TFEU is to be found in the fact that the Court of Justice does have jurisdiction over the latter. This means that although the Article has weaknesses, there are also some positive aspects. By referring to the European Union, rather than to the Member States specifically, it offers few opportunities to enforce the application of the principles that it stipulates in terms of the foreign activities of the individual Member States or their institutions. Its powers of coercion are very limited, as it enables action to be taken only when it can be shown that the activities of an institution in the Union or of a Member State are based on the TFEU and are in contravention of Article 21. Nevertheless, the Article may be useful in terms of influencing EC policy as a whole, which may also enable it to be used to indirectly influence public and private actors.

Another mechanism within the European system that should be evaluated in terms of influencing foreign activities is the **European Charter of Fundamental Rights**. This is a relatively new instrument in that it only finally came into effect in December of 2009, together with the Treaty of Lisbon. Once again, we consider here Samkalden's (2013) conclusions on this issue. She observes that there is still some lack of clarity as

to its sphere of action. It is clear that it applies to the Union and its institutions, organs, offices and agencies, at both and internal and an external level. It is also applied to Member States (Article 51 of the Charter), however, only when these implement the laws of the Union. Before the Charter became legally binding, the EU Courts of Justice had already accepted that Human Rights formed part of the General Principles of the Law. Thus Member States should not only comply with the European Charter of Fundamental Rights in those areas in which they should implement the European legal system. They are also subject to the Charter when they execute an EU Regulation, directive decision, or any international accords signed by the Union. In terms of private actors, the Charter does not automatically apply. Nevertheless, Samkalden (2013) reminds us that the European Convention on Human Rights stipulates the "horizontal application" of some human rights considered to be fundamental. In Article 52 of the Charter, it is mentioned that its scope should be the same as that of the Convention. Some margin for action therefore exists and needs to be assessed on a case-by-case basis. The Charter may therefore prove useful when it comes to influencing some areas of European foreign policy.

External responsibility: policies in the Spanish State

The extraterritorial nature of Spanish policy became clear in 2014 with the Law on the External Action and Service of the State, which stated five main aims[7]: promote the values and interests of the Spanish State in strengthening its the presence and image at an international level; consolidate its credibility in order to increase the export of goods and services and the expansion of private Spanish capital, and to attract investment; articulate with the foreign policy of the European Union; coordinate with the "Ibero-american Comunity of Nations" based on "cultural and linguistic affinity"; and guarantee the protection of Spanish citizens, and support private Spanish businesses abroad. Meanwhile, Spanish foreign policy claims to aspire to principles such as respect for human dignity, freedom, and the Rule of Law, as well as defending the principles of the UN Charter. The Law also stipulates that foreign action on Human Rights should promote the European Union's Human Rights Directives[8]. Despite all this, there are no binding mechanisms in Law that ensure respect for HR or ESCR in the Spanish government's foreign activities. There is a clear statement of the intent to promote the internationalisation of private Spanish businesses in sectors such as tourism, energy, construction and infrastructure, and no mechanism is stipulated for monitoring the respect for HR shown by these companies. On that issue, the Foreign Action Strategy (MAEC 2015, 77) requires only voluntary Corporate Social Responsibility.

Furthermore, although the Foreign Action Strategy refers to the principle of Policy Coherence on Development (PCD), it fails to establish the mechanisms that would make it possible to make that principle effective in particularly delicate areas on issues such as the protection of the environment or ESCR. A recent study by Barbero and Llistar (2014) into the Spanish energy model and its impacts abroad concludes that the model is only really considered in its domestic form, ignoring the complexity and the element of conflict present in the countries from which the Spanish State imports its energy. Thus, unlike other States such as the Unite Kingdom, Spain has not conducted any official diagnosis of the social and environmental impacts generated by that model in third countries. In fact, "the values,

7 See here (in Spanish).

8 The directives can be consulted here.

instruments and capacities present in the Spanish Government on the issue of PCD as applied to Spanish energy policy are notable for their total absence" (Barbero and Llistar 2014, 42)[9].

Some years ago a window of opportunity opened, in terms of increasing the coercive power of foreign responsibility measures, in the form of the **Law 26/2007 on Environmental Responsibility**[10], which could, nonetheless, be put to better use. This Law stipulates that, in their actions outside the European Union, Spanish companies have the obligation to "*prevent, avoid and repair environmental damage in application of the international accords, principles, objectives and regulations on this issue to which Spain is a signatory (...)*". It is also established that companies that fail to comply with their obligations, and that have been the beneficiaries of public support for their internationalisation are obliged to return the public money they received for the development of the activities that caused the environmental destruction in question and they will be banned from receiving further aid for two years. According to Pigrau (2015), this could be an interesting mechanism in terms of assessing foreign responsibility through the Foreign Investment Fund (FIEX), the Official Credit Institute's PROINVEX programme, the Spanish Export Credit Insurance Company (CESCE), the Development Promotion Fund (FONPRODE by its Spanish acronym) and other sources of finance for internationalisation launched by the Official Credit Institute.

Another public tool exists in the form of the **Law 30/2007 of 30th October on Public Sector Contracts**. In effect, Article 49 explicitly refers to the prohibition on hiring persons who have been found guilty of crimes of illicit association, corruption in international economic transactions, crimes against workers rights, crimes relating to the environment, and others.

At a Catalan level, it is important to note that towards the end of 2014, the Catalan Parliament approved the Law 16/2014 on Foreign Actions and relations with the European Union. The law is currently suspended pending an appeal lodged by the Spanish Government and accepted for a hearing at the Constitutional Tribuna[11], however, it does contain two important elements that are worth highlighting for these reflections. Firstly, thanks to the pressure applied by civil society, the Law includes among its aims the promotion of Peace, the defence of Human Rights and sustainable human development. Secondly, it explicitly links the internationalisation of the economy with the defence of and respect for Human Rights[12]. In effect, Article 12 stipulates that in the economic promotion of Catalan business abroad, the Government must guarantee coherence with the United Nations Guiding Principles on Business and Human Rights, and always protect respect for Human Rights in any action or undertaking.

The foreign Responsibilities of business: towards binding regulations

Transnational corporations (TNCs) are not "legal persons" under International Law. They are granted a **large number of rights**, stipulated in the Agreements signed between States for the protection of investments and general access to markets, however, **the only direct obligations they have are the ones contained in their contracts**. No international tribunals exist with responsibility over TNCs, except the arbitration tribunals linked to the protection of investments and inter-

9 See also Pérez González (2015).

10 See (in Spanish): **Law 26/2007, of 23rd October, on Environmental Responsibility** (Thirteenth additional ruling. Environmental Responsibility abroad).

11 See **here** (in Catalan):

12 See the **NGO sector press release on this issue** (in Catalan).

national trade (Pigrau 2015). Since the 1970s, efforts have been made at the UN to create obligatory regulations for the behaviour of TNCs. For example, the attempt to adopt a "**Code of Conduct for Multinational Companies**" (1974) and the "**Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**" (UN Subcommission on the Promotion and Protection of Human Rights, 2003), which in the end failed to get the approval of the Human Rights Commission. Instead, what has prospered at an international level are the voluntary rules. Among these we should highlight:

- The "**OECD guidelines for multinational enterprises**" (1976).
- The "Tripartite declaration concerning principles on multinational corporations and social policy", **International Labor Organization** (1977).
- The **UN Global Compact** (1999).
- Resolution 17/4 "Guiding principles on Business and Human Rights", of the UN Human Rights Council(16/06/2011).

Since June 2014 a new space has been created at the United Nations by Resolution 26/9 of the Human Rights Council "**Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights**"[13]. The process will be long, but the inter-governmental working group that is beginning to produce the binding instrument was already activated in 2015.

This initiative constitutes a considerable advance towards binding regulations that force transnational companies to respect Human Rights. In parallel to this, international civil society, as part of the Global Campaign to Dismantle Corporate Power and End Impunity[14], with the support of a team of experts within the International Human Rights System, has produced the "**International People's Treaty**"[15]. This is a political tool that sketches an alternative vision of Rights and Justice, reaffirming the role of Peoples as political protagonists. The Laws and Regulations of any political, economic and judicial system that ensures the foreign responsibility of major corporations be totally subject to Human Rights and ESCR must be based on the People. The most interesting aspect of this Treaty lies in its redefinition of crimes from the point of view of the affected communities. It is also important to note that with the UN Resolution of June 2014 and the People's Treaty, we can begin to see the way towards a Global Court that can judge violations of ESCR committed by transnational companies.

Presentation of the case of Chevron in Ecuador before the Permanent People's Tribunal, June 2014 (Photo: Global Campaign to Dismantle Corporate Power)

13 See **Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights**; the **CETIM Press Release**; and that of the **Transnational Institute**

14 See **here**.

15 See **here**.

By way of a conclusion

Pigrau (2015) reminds us that nothing is preventing a State from making the existing voluntary commitments obligatory for companies based in that country. From an administrative point of view, States also have the possibility to create a framework of regulations that stimulates companies operating abroad to apply their voluntary commitments. For example, incentives could be established that reward compliance with these commitments; a credit system could be established based on the behaviour of the companies in relation to their voluntary commitments; sanctions could be established for those companies that produce misleading publicity material that alleges their compliance without ever proving it; social certificates could be established that guarantee to consumers, investors and workers that the company is behaving appropriately on issues of human rights and the environment. Furthermore, a State could ensure that its policies or administrative acts do not support any company that violates Human Rights or causes environmental destruction. The case of the Norwegian Sovereign Fund is a good illustration in this sense. It has an ethics council that analyses possible complicity in activities considered unethical and recommends not to invest in companies that fail to meet certain criteria and/or are implicated in serious Human Rights Violations[16].

On the other hand, the achievements and advances made in 2014 within the framework of the United Nations may change the rules of engagement. The vast majority of countries officially respect the rules established at the United Nations in their constitutions and laws. As these rules begin to change, the effects in terms of greater public and private responsibility for activities undertaken abroad may be considerable.

16 See here.

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